

9 FAM 40.103 NOTES

*(CT:VISA-2273; 04-09-2015)
(Office of Origin: CA/VO/L/R)*

9 FAM 40.103 N1 PURPOSE AND SCOPE

(CT:VISA-2273; 04-09-2015)

INA 212(a)(10)(C) was included in the Immigration Act of 1990 (IMMACT of 90) as a means of combating the increasing number of child abductions from the United States by alien parents. INA 212(a)(10)(C) renders the alien inadmissible so long as the alien withholds custody of the U.S. citizen child outside of the United States from the individual granted custody of the child by a U.S. court, and so long as the child remains a "child" according to INA 101(b)(1) (i.e., unmarried and under 21 years of age). It also renders ineligible those assisting or providing material support or safe haven to the abductor. However, Congress made an exception for aliens who take abducted children to a country that is party to the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) because the Convention provides a legal framework for the return of abducted children to the child's place of habitual residence in order to resolve custody disputes.

9 FAM 40.103 N2 INADMISSIBILITY UNDER INA 212(A)(10)(C)

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Note: Under INA 212(a)(10)(C), an alien is ineligible for a visa if the conditions in the law are satisfied. Post does not have discretion to decide not to apply the ineligibility. See 9 FAM 40.103 N7.2 below for guidance on when Advisory Opinions are necessary.

9 FAM 40.103 N2.1 Elements for INA 212(a)(10)(C)(i)

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An alien is ineligible under INA 212(a)(10)(C)(i) if:

- (1) The child is a U.S. citizen;
- (2) A court in the United States has issued an order granting custody of the child to someone other than the alien;
- (3) The alien is detaining or retaining the child, or withholding custody of the child, from the person granted custody by the U.S. court order; and
- (4) The child is outside of the United States and in a country that is NOT a U.S. partner to the Convention.

NOTE: INA 212(a)(10)(C)(i) does not require the child to have been taken out of, the United States. Nor does it require the alien to have been in the United States.

9 FAM 40.103 N2.2 Elements for INA 212(a)(10)(C)(ii)

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- a. INA 212(a)(10)(C)(ii) provides grounds of ineligibility for aliens who support an alien whose conduct has satisfied all the elements necessary to be found ineligible under INA 212(a)(10)(C)(i).
- b. An alien is ineligible under INA 212(a)(10)(C)(ii) if, the following elements are satisfied:
 - (1) The primary abductor is an alien described in INA 212(a)(10)(C)(i), even if the primary abductor never applied for a visa. Note that if the primary abductor is a U.S. citizen, INA 212(a)(10)(C)(ii) cannot be applied to any persons assisting the abductor because both INA 212(a)(10)(C)(i) and INA 212(a)(10)(C)(ii) require the primary abductor to be an alien; and
 - (2) The applicant intentionally assisted the abductor or intentionally provided material support or safe haven to the abductor.
- c. See 9 FAM 40.103 N3 below for information about how to

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interpret these requirements.

9 FAM 40.103 N2.3 Designation Under INA 212(a) (10)(C)(ii)(III)

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- a. Under INA 212(a)(10)(C)(ii)(III), the spouse (other than the spouse who is the parent of the abducted child), child (other than the abducted child), parent, sibling or agent of an abductor can be designated inadmissible by the Secretary of State in the Secretary's sole and unreviewable discretion.
- b. An alien is inadmissible under INA 212(a)(10)(C)(ii)(III) if the following essential elements are present:
 - (1) The visa applicant is either a spouse, child, parent, sibling, or an agent of the abductor;
 - (2) The abducted child has not been returned to the person granted custody or has aged out; and
 - (3) The agent or relatives has been designated by the Secretary of State as ineligible. Note: There is no process currently in place for such designation, and the use of INA 212(a)(10)(C)(ii)(III) will be rare. Please contact your Country Officer in Children's Issues if you think there is a case for which use of this provision may be appropriate.

9 FAM 40.103 N3 DEFINITIONS

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- a. **"Agent"** is generally defined as a person authorized by another person to represent or act for that person. Most cases of agent representation will be based on a contractual relationship such as attorney client, but numerous other possibilities exist. Such determinations should be made in consultation with Advisory Opinions Division, (CA/VO/L/A).
- b. **"Any alien"** refers to any individual who is not a U.S. citizen or U.S. national, including lawful permanent residents (LPRs).
- c. **"Assisted"** includes any action that enabled the abductor to detain or retain the child or withhold custody. However, it does not include any assistance that was "de minimis," or that bore no nexus to actions that form the basis of an ineligibility under INA

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212(a)(10)(C)(i). For example, assistance that can result in ineligibility under INA 212(a)(10)(C)(ii) may include, but is not necessarily limited to: helping the abductor get re-established in the foreign country; providing housing, financial support, or free child care; and/or actively interfering with the custodial parent's efforts to enforce the U.S. custody order.

- d. **"Child abduction"** is defined in the statute as detaining or retaining the child, or withholding custody of the child, outside the United States after the entry of a custody order by a court in the United States granting custody to a different person. The alien need not be responsible for removing the child from the United States to be found ineligible so long as the alien detains or retains the child outside the United States. The fact that the child might express a preference to reside with the alien is not a relevant consideration. Provided the child continues to reside with the alien in violation of the custody order, the alien will be considered to be detaining or retaining the child or withholding custody of the child.
- e. **"A court order granting custody"** refers to any order by a court in the United States granting custody. The order may be of a temporary nature, providing no subsequent order by a court in the United States has been entered and temporary order has not expired. In the event there are conflicting custody orders the custody order from the country to which the child was abducted is irrelevant to the INA 212(a)(10)(C) finding. The 10(C) finding is based on the order by a court in the United States, regardless of whether that order was issued before or after the abduction. Custody may be physical, legal, sole, or joint. Generally, 10(C) will not apply in access-only cases, including those cases in which the child's alien parent had the right to move overseas with the child or the right to designate the child's primary residence.
- f. **"A court in the United States"** refers to any federal, state, or local court having jurisdiction to grant an order custody.
- g. **"Intentionally"** means that the alien providing such assistance, material support or safe haven did so, purposefully and knew or reasonably should have known that such aid enabled an abductor to detain or retain a child or withhold custody of the child in violation of an order by a court in the United States. An alien cannot make himself or herself willfully blind to the abductor's bad conduct, the child's custodial history, the child's

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parents' relationship, how the child came to live outside the United States, or other factors that would lead a reasonable person to conclude that the child is being detained, retained or withheld in violation of an order by a court in the United States. While the applicant does not need to know definitively that there is a custody order, he or she would need to know (or reasonably should have known) that there is an ongoing dispute as to the custody of the child.

- h. **"Material support"** includes, but is not limited to, an alien aiding an abductor in the abduction itself by providing transportation, funds, false documentation, or identification to, or aiding in the communication of, any abductor.

9 FAM 40.103 N4 WITHHOLDING CHILD OUTSIDE UNITED STATES

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In many cases, the most difficult element in establishing inadmissibility under this section will be determining the location of the child. Where an alleged abductor refuses to divulge the location of a child and the abductor is currently residing abroad, you may presume that the child is residing with the abductor. Any assertion by an abductor who resides abroad that the child remains in the United States (e.g. with relatives) should be established to your satisfaction by direct evidence.

9 FAM 40.103 N5 TIMING CONSIDERATIONS

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- a. The timing of a U.S. custody order's entry in relation to the time of abduction is irrelevant to visa ineligibility. The existence of a U.S. custody order, whether it was entered before or after the abduction, satisfies the custody order requirement for a finding of inadmissibility under INA 212(a)(10)(C). In other words, if a court in the United States enters a U.S. custody order after the child has already left, and then any alien who is bound by the order must return the child to the United States, in order to avoid inadmissibility.

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- b. For an alien to be ineligible under INA 212(a)(10)(C)(ii), the assistance or material support does not need to be ongoing; it only has to have been provided after the applicant knew or reasonably should have known about the custody order.

9 FAM 40.103 N6 EXCEPTIONS

9 FAM 40.103 N6.1 Government Officials

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The exceptions for U.S. Government and foreign government officials apply to those government officials who are providing support to a household or individual that currently holds an abducted, when such officials are acting in their official capacity.

9 FAM 40.103 N6.2 Hague Convention Countries

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The law provides for an exception to be made for an alien who takes an abducted child to a country that is a U.S. partner to the Hague Convention because the Convention provides an established legal mechanism or framework for returning the child to the child's place of habitual residence so that custody disputes may be resolved. Since the Convention provides a remedy of return, the Congress chose not to penalize an abductor who removes a child to a country that is a Hague partner. If you are uncertain whether a particular country is a Convention partner country, please inquire with your country desk office in CA/OCS/CI's Outgoing Abductions divisions or visit the abduction resources page.

9 FAM 40.103 N7 PROCEDURES

9 FAM 40.103 N7.1 Requests Initiated by the Office of Children's Issues (CA/OCS/CI)

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- a. In many cases, the OCS/CI country desk officer will initiate the INA 212(a)(10)(C) visa ineligibility request and provide

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supporting case details and documentation such as the U.S. custody order.

- b. When there is no pending visa application or valid U.S. visa, the OCS/CI country desk officer will submit a request for a P10C lookout or L lookout directly to the Fraud Prevention Manager at post, copying the American Citizens Services (ACS) chief. Supporting documentation, most importantly the U.S. custody order, must be included with all requests. Within five business days, the Fraud Prevention Unit at post must enter the appropriate CLASS entries as requested or respond to CA/OCS/CI with any questions or concerns about the request.
- c. When requesting a visa revocation, the OCS/CI country desk officer will work with VO/L/A, OCS/L, and L/CA for concurrence prior to sending the request to post. If you concur with the facts as presented by the Department, you should then follow normal visa revocation procedures under 9 FAM 41.122.

9 FAM 40.103 N7.2 REFERRAL for Advisory Opinion

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- a. You must refer the case to the Advisory Opinions Division (CA/VO/L/A) for an advisory opinion if you believe the alien is inadmissible under INA 212(a)(10)(C). Any formal opinions rendered by CA/VO/L/A will be made in consultation with the office of Legal Adviser Consular Affairs (L/CA), Overseas Citizens Services, Office of Children's Issues (CA/OCS/CI), and Office of Overseas Citizens Services, Legal Affairs (CA/OCS/L).
- b. While no formal advisory opinion is necessary to make a P10(C) entry, as a general matter you should be in touch with your CA/OCS/CI country officer whenever you suspect that INA 212(a)(10)(C) may apply.
- c. If you suspect a visa applicant may be involved in an international child abduction, contact the OCS/CI country desk officer, who will be able to advise on whether a U.S. custody order exists and whether INA 212(a)(10)(C) may apply. In addition, you should contact Post's ACS team, which will provide background about the international parental child abduction case.
- d. If you suspect that a visa applicant might be ineligible under INA

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212(a)(10)(C)(ii) but the potential abductor's eligibility under INA 212(a)(10)(C)(i) has not been assessed, start by determining whether the potential abductor would be ineligible under 10(C)(i) if he or she had made a visa application. If you determine that the abductor would be ineligible under 10(C)(i), enter a P10(C)(i) hit for the abductor and then assess whether the visa applicant should be found ineligible under INA 212(a)(10)(C)(ii).

9 FAM 40.103 N8 REMOVAL OF THE INADMISSIBILITY

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An alien remains ineligible under INA 212(a)(10)(C) only so long as the child has not been returned to the person granted custody by the order of a court in the United States and such person and child are permitted to return to the United States or such person's place of residence. Once the child is surrendered to the person having lawful custody, the ineligibility ceases to apply, and OCS/CI country officer will require that Post delete any INA 212(a)(10)(C) ineligibilities entered into the Consular Lookout and Support System (CLASS). (See 9 FAM Appendix D 203 Deletions for more information.) The alien's ineligibility will also cease if the child reaches 21 years of age, marries, "or death(dies)."

9 FAM 40.103 N9 WAIVERS

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Even if an alien expresses an interest in returning the child to the United States, the ineligibility still applies until the child is surrendered to the person granted custody by a court in the United States. An alien may, however, be eligible to receive a NIV waiver pursuant to INA 212(d)(3)(A). Please see 9 FAM 40.301 for more information on NIV waivers. Please also see 9 FAM 42.1 N4 for more information on humanitarian parole.

9 FAM 40.103 N10 LAWFUL PERMANENT RESIDENTS

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If you know or suspect a lawful permanent resident has incurred an ineligibility under INA 212(a)(10)(C), you should not make any entries into CLASS. Instead contact CA/OCS/CI-Abduction for guidance.